MINUTES OF THE

ADVISORY COMMITTEE ON APPELLATE RULES

APRIL 3 & 4, 1997

Judge James K. Logan, Chair of the Advisory Committee, called the meeting to order at 8:40 in the conference room of the Thurgood Marshall Federal Judiciary Building. The following Advisory Committee members were present: Judge Will Garwood, Judge Alex Kozinski, Judge Diana Gribbon Motz, Mr. Michael Meehan, Mr. Luther Munford, and Mr. John Charles Thomas. Mr. Robert Kopp was present representing the Solicitor General. Judge Steven Williams, whose term on the Advisory Committee had recently expired, was in attendance. Judge Alicemarie Stotler who chairs the Standing Committee, Judge Frank Easterbrook who is the liaison from the Standing Committee, Judge James Parker who chairs the Standing Committee's Subcommittee on Style, and Professor Daniel Coquillette who is the Reporter for the Standing Committee were all present, as was Mr. Joseph Spaniol who is a consultant to the Standing Committee. Mr. Patrick Fisher, who represents the clerks, was present. Ms. Judy McKenna, from the Federal Judicial Center, and Mr. John Rabiej, of the Administrative Office, were also present.

Judge Logan introduced Judge Motz and welcomed her to the Advisory Committee.

Approval of Minutes

The minutes of the April 1996 meeting, and of the May 1, 1996, telephonic meeting, were approved without any additions or corrections.

Restylization of the Rules

The primary item on the Committee's agenda for the meeting was consideration of the packet of restyled rules published for comment during 1996. Each member of the Committee received copies of all of comments submitted during the publication period. Prior to the meeting the Reporter summarized the comments and made recommendations concerning their implementation.

The reaction to the undertaking was strongly positive. Of the eighteen commentators who offered general observations on the value of the project, all but one was very favorable. The consensus was that substantial improvements had been made in both the language of the rules and in their structure, that the

rules are easier to comprehend, and, that they are, as a result, fairer.

Rule 1

The Advisory Committee recommended making no post-publication changes in Rule 1. The Reporter had recommended changing Rule 1(a)(2) to state that "[w]hen these rules provide for making and filing a motion or other document in the district court, the procedure must comply with the practice of the district court." The Committee disagreed. To the extent that "making" is distinguished from "filing," it refers either to service - as in making a motion by serving it - or it refers to making an "oral" motion. To the extent that the Appellate Rules are concerned with district court practice, the rules deal only with the filing of papers in the district court.

Judge Easterbrook asked that Rule 1(b) be placed on the Committee's agenda for future consideration. He noted that it says that the appellate rules "do not extend or limit the jurisdiction of the court of appeals." Yet, the Supreme Court has clearly stated that failure to comply with Rules 3, 4, or 5 creates a jurisdictional defect. The recent amendments to the Rules Enabling Act permit the rules to define finality for purposes of appeal.

Rule 2

The Advisory Committee approved the minor style changes suggested by the Reporter.

Rule 3

The Advisory Committee approved one major change in Rule 3 and several minor changes.

The major change is to incorporate the sole remaining paragraph of Rule 3.1 as subparagraph 3(a)(3) and move existing subparagraph (3) to subparagraph (4).

Several commentators suggested that paragraph (b) of the published rule blurred the distinction between joint and consolidated appeals. The Committee rejected the suggested language aimed at clarifying the distinctions. In particular, the Committee found the description of consolidated cases misleading for two reasons: first, appeals from a single judgment may be consolidated rather than joined when the interests of the appellants are such that joinder is not practicable; second, the extent to which consolidated appeals functions as a single appeal is unclear. The Committee also decided to alter a provision, contained in the published version, requiring that a court "order" consolidation. The Committee agreed that consolidation should be court initiated, but that consolidation could be accomplished by court rule rather than by court order.

The Committee Note must be amended to reflect the changes made by the Committee.

Rule 3.1

The *Federal Courts Improvement Act of 1996,* Pub. L. 104-317, made 3.1(a) obsolete. It is no longer possible to consent to appeal to a district court following trial by a magistrate judge and, after the first appeal, to seek a discretionary appeal in the court of appeals. Appeal from a judgment entered after trial by a magistrate judge now lies directly to a court of appeals and is a matter of right.

The primary purpose of 3.1 was to establish the procedure to be used to obtain the second and discretionary appeal, following the initial appeal in the district court. Since the two-tiered discretionary appeal is no longer available, the Advisory Committee decided that the remaining provision (3.1(b)) could be incorporated in Rule 3(a).

The Committee Note will explain the abrogation of the rule.

Rule 4

In Rule 4(a)(4)(A)(vi), the Committee amended the provision to state that the 10-day period should be computed using Civil Rule 6(a). The amendment is intended to remove any confusion about whether to use the counting rule in FRAP 26 or its counterpart in the Civil Rules. Since the motion is filed in the district court, the amendment requires use of the district court rule. Because the issue was discussed in the published Committee Note, which indicated the Advisory Committee's belief that the Civil Rules counting method should be used, the Advisory Committee believes that this amendment can be made without republication.

In Rule 4(a)(5)(A)(i), the Committee approved changing "within" to "not later than." The term "within" denotes both a beginning and ending time; a paper filed before the beginning time is premature. The term "no later than" denotes only an ending time. Because an extension, especially for good cause, could appropriately be applied for prior to expiration of the time for filing a notice of appeal, "no later than" is the better term.

Two commentators objected to the amendment of (a)(6) that would preclude reopening the time for appeal if the movant received notice of entry of judgment from "the court". In contrast, under the existing rule only notice from a party or from "the clerk" bars reopening. The Committee decided to retain the amendment. Regardless of the way in which a party receives notice, a party who has received notice should not be able to reopen the time. Quite clearly, however, the party must receive notice that judgment has been entered; in contrast, notice from a judge that the judge intends to enter judgment is not sufficient.

Rule 4(b)(1)(B)(ii) was changed back to the language in the existing rule so that it says the government may appeal within 30 days after entry of judgment or "the filing of a notice of appeal by any defendant." The published rule would have permitted the government to appeal within 30 days after "the filing of the

last defendant's notice of appeal." The published version eliminated an ambiguity created by the term "any defendant." Requiring the government to appeal within 30 days after the filing of a notice by "any defendant" could mean that the government may file its notice of appeal as to all defendants as late as 30 days after the last notice is filed by any defendant. Conversely, it may mean that the government must file its notice within 30 days after the first defendant files a notice of appeal. The published version, however, created its own problems. One of the commentator's noted that a co-defendant can plead guilty and begin serving time perhaps a year or more prior to the sentencing of another co-defendant. The published language could permit the government to simultaneously appeal both sentences if the second defendant appeals. The government's appeal from the first sentence could, therefore, be filed long after the first defendant began serving time.

Before deciding to return to the current language, the Committee considered, and ultimately rejected, alternative solutions to the problem. The 4(b)(1)(B)(ii) problem is not solved by limiting the government's filing time to 30 days after judgment or "the filing of a notice of appeal by the defendant or, if there were multiple defendants, the filing of the last notice of appeal filed by any of the defendants who were tried together and whose judgments were entered on the same day." That solution is problematic because defendants who are tried on the same day often are not sentenced simultaneously, nor are their judgments entered by the clerk on the same day. Eliminating the requirement that the judgments be entered on the same day reopens the possibility of the government being able to appeal as much as a year, or more, after a co-defendant's judgment has been entered when there is a significant delay in the sentencing of one co-defendant. Another alternative considered was to allow the government to appeal within 30 days after the filing of the last notice of appeal by any of the defendants whose appeals were entered within 30 days of another co-defendant's appeal. The problem with that solution is that if there are more than two co-defendants there is still a rolling window. Appeal one could be followed by 30 days later by appeal two and appeal three could follow 15 days later, etc. As the discussion became increasingly convoluted, the Committee unanimously decided to return to the "ambiguous" existing language and to place the problem on Committee's docket for later thorough discussion.

Two commentators opposed the change in (c) that would require an inmate to use the special internal mail system for legal mail, if there is such a system. The advantage of using the legal mail system is that the system usually records the date when mail is deposited in the system. The Committee decided to make no change.

Rule 5

The Reporter preceded the discussion of Rule 5 by recounting that in August 1996 a new Rule 5, that would have consolidated former Rules 5 and 5.1 into one rule, had been published for comment. Following publication, the *Federal Courts Improvement Act of 1996* made Rule 5.1 obsolete. Therefore, although not published as part of the style packet, abrogation of Rule 5.1 has become necessary, and the amendments suggested in the published Rule 5 should be considered at this point and, if approved by the Committee, included with the full body of the rules.

Only minor amendments were made in the text of the rule following publication; most of the changes were stylistic. Under Paragraph (a)(3) a district court "may amend" an order that a party wishes to appeal. That paragraph was amended to state that the amendment may be undertaken either *sua sponte* or in

response to a party's request.

Rule 6

Only two minor word changes were made in Rule 6.

Rule 7

No changes were made in Rule 7.

Rule 8

In response to a commentator's suggestion, a new subparagraph, (a)(2)(E), was created by moving material from subdivision (b) to the new subparagraph. Otherwise, only minor language changes were made.

Rule 9

The last sentence of published Rule 9(a)(1) said that an appellant must file a transcript or "explain why a transcript was not obtained." To make it clear that the explanation should be written and filed, the sentence was changed to state that an appellant must "file a transcript of the release proceedings or an explanation of why a transcript was not obtained."

There was discussion about the necessity of retaining "judgment of" in the captions to subdivisions (a) and (b). Because of the ambiguity of the term "conviction" and the need to clearly indicate that subdivision (a) applies to all phases preceding sentencing and that subdivision (b) applies to all phases after sentencing, the Committee decided not to amend the captions.

Rule 10

Only minor word changes were made in Rule 10.

Rule 11

Only minor word changes were made in Rule 11.

Rules 12, 13, and 14

No changes were made in Rules 12, 13, or 14.

Rule 15

Several punctuation changes and minor word changes were made in Rule 15. Paragraph 15(c)(1) was amended so that it more closely follows the current Rule. Existing Rule 15(c)(1) requires service "at or before the time of filing a petition for review." The published rule said that a petitioner must already have served a copy on other parties at the time of filing and one commentator objected to that change. Because no substantive change was intended, the Committee amended the rule to state that service must occur at or before the time of filing.

The rule requires the clerk to serve the petition for review on the respondent; the petitioner is required to serve each party admitted to participate in the agency proceedings other than the respondents. The Committee had previously discussed the uncertainty concerning the service obligations in proceedings involving informal agency rulemaking. The Committee reiterated its interest in pursuing the question and using the D.C. Circuit's local rule as a possible starting place.

Rules 15.1, 16, 17, 18, 19, and 20

No changes were made in Rules 15.1, 16, 17, 19 or 20. In Rule 18 a plural was changed to singular in 18(a)(2)(A)(ii).

Rule 21

Minor language changes were made in Rule 21. In 21(b)(4), the phrase indicating that a trial-court judge may "respond" only if invited to do so by the court of appeals was changed because it might cause confusion by implying that the trial judge would then be a respondent. The word "respond" was deleted and changed to say that a trial judge, if invited to do so, could "address the petition."

Rule 22

To introduce the discussion, Judge Logan noted that the *Anti-Terrorism and Effective Death Penalty Act of 1996*, Pub. L. 104-132, amended the language of Rule 22. The Congressional amendment created two ambiguities. First, the caption of Rule 22 refers to 28 U.S.C. § 2255 but the text of the rule makes no mention of § 2255. Second, subdivision (b) leaves it unclear whether a district judge may issue a certificate of appealability. Judge Logan attempted to get both of these difficulties corrected before the legislation was passed but he was unsuccessful. After passage of the legislation, there was an attempt to ascertain how the Congress would like the ambiguities resolved, especially the uncertainty concerning the power of a district judge to issue a certificate of appealability. John Rabiej indicated that we received no direction other than that the problem could be worked out by the courts. In the interim, three circuits

have determined that a district judge may issue a certificate of appealability. Judge Logan, therefore, recommended that the Committee adopt that approach.

Because of the statutory amendment, the Advisory Committee could not work with the published language, but worked with the statutorily amended Rule.

In subdivision (a), the only changes made were language changes to make the style of this rule consistent with the other rules. Most notably, the "shalls" were changed to "musts." There was a lengthy discussion about the prudence of making even minor stylistic changes in language that was only recently enacted by the Congress. The conclusion was that it was appropriate to make stylistic changes in subdivision (a), but not any substantive change.

In subdivision (b), paragraph (a), three substantive changes were made; the first two changes were necessary to eliminate ambiguities. First, in order to make the rule consistent with the statute (28 U.S.C. § 2253) the paragraph was made applicable to 28 U.S.C. § 2255 proceedings. The redrafting was guided by the statutory language in § 2253. Second, the rule was amended to state that a certificate of appealability may be issued by "a circuit justice or a circuit or district judge." The reference to a "circuit justice" was added to bring the rule into conformity with § 2253. The reference to a "district judge" was already in the rule as amended by Congress, but not clearly so in § 2253 (which says that a "circuit justice or judge" may issue a certificate of appealability). In light of the three recent circuit decisions, and in the absence of any other direction from the Congress, the Advisory Committee decided to amend the rule to state that all three (the circuit justice, a circuit judge, or a district judge) may issue a certificate. Third, the existing rule says that a certificate of appealability is not necessary when an appeal is taken by the state or its representative. Because the rule now applies to § 2255 proceedings, the rule was amended to state that no certificate is necessary when the United States or its representative appeals.

The reporter was asked to draft a new Committee Note.

Rule 23

The only change was to correct a typographical error in the Committee Note.

Rule 24

Two minor stylistic changes were adopted.

Rule 25

The version of Rule 25(a)(2)(B)(ii) that became effective on December 1, 1996, said that a brief or appendix would be timely filed "if on or before the last day for filing, it is . . . dispatched to the clerk for delivery within 3 calendar days by a third-party commercial carrier." (Emphasis added.) The restyled version suggested that the word "calendar" be deleted. The Committee Note explained that suggested

revision as follows:

Deleting the word calendar means that under Rule 26(a)(2) Saturdays, Sundays, and legal holidays are not counted in the 3-day period. This is desirable because when the last day for filing is also the last day the courts are open before a three-day weekend, it may be difficult or impossible to get a commercial carrier to commit to delivery to the court within 3 calendar days, i.e. to delivery when the court is closed.

One commentator suggested that merely deleting the word "calendar" does not make it sufficiently clear that Saturdays, Sundays, and Holidays are not counted.

One member of the Advisory Committee suggested reinserting the word "calendar" because under Rule 26(a)(2), the 3-day period could become 6 days if the document is dispatched on a Friday before a 3-day weekend. Another member pointed out that Rule 26(a)(3) should eliminate any difficulty in getting a carrier to commit to delivery to the court within 3 calendar days. Rule 26(a)(3) provides that the last day of a period is not counted if it is a Saturday, Sunday, or legal holiday. Under that provision, if a brief or appendix were given to a carrier for delivery within "3 calendar days" and the carrier were given the document on Friday before a 3-day weekend, the carrier would have until Tuesday to deliver the document. A 3-calendar day period could become 4 days if the court is closed on the third day, but absent extraordinary circumstances 3 calendar days could not be longer than 4 days.

A 3-calendar-day period is also used in Rules 25(c) [dealing with manner of service] and 26(c) [dealing with a party's additional time to act after service by mail or commercial carrier].

Rule 26

The Advisory Committee's discussion of the meaning of "calendar days" in Rule 25 led the Committee to also recommend amendment of Rule 26(a)(2) to provide that Saturdays, Sundays, and legal holidays are not excluded when a period is stated in calendar days.

The discussion again surfaced about whether Rule 26(a)(2) should be amended to exclude intermediate Saturdays, Sundays, and holidays whenever a period is less than 11 days. That would make the appellate rule consistent with the civil rule. It was decided that such a substantive change should not be made at this point, but that it should be considered in the future.

Rule 26.1

The only changes suggested in Rule 26.1 were adopted following the publication of the rule in September 1995. The changes were tentatively approved by the Standing Committee in summer 1996.

The Committee Note developed in conjunction with the prior publication will be used. Minor modifications have been made so that it is consistent with the other notes in the style package.

Rule 27

Rule 27(a)(3)(A) was amended to clarify that if a court intends to grant a motion authorized by Rules 8, 9, 18, or 41, but the court does not want to await a response to such a motion, the court must give reasonable notice to the parties before the court grants the motion. The Committee agreed that it is implicit in the rule that a court may deny a motion at any time; a court need not await a response or give notice prior to denying a motion. There was discussion about the advisability of adding a sentence to Rule 27(a)(3)(A) stating that a motion may be denied at any time. It was decided that because of the substantive nature of the recommendation, consideration of any such language should be taken up at a later time. Because Rule 27(b) states that a court may act on a motion for a procedural order without awaiting a response, the reference in 27(a) to procedural orders was omitted.

It was also agreed that a court may act without awaiting a reply to a response. In an effort to remove any implication that there is an absolute right to file a reply before the court acts, the language of Rule 27(a)(3)(4) was altered. The language was changed from "[t]he moving party may reply to a response within 7 days . . ." to "[a]ny reply to a response must be filed within 7 days . . ." The Committee Note was amended in a minor way also to remove any implication that there is an absolute right to file a reply. Since a court has general authority to shorten or extend the time, the Advisory Committee omitted that language from 27(a)(4).

The Committee Note was also amended to say that spiral binding and stapling satisfy the binding requirement.

The discussion of the restyled rules was briefly suspended to give Professor Daniel Coquillette, the Reporter for the Standing Rules Committee, the opportunity to discuss his work on the quesion of local rules governing attorney conduct.

Local Rules Governing Attorney Conduct

For the past two years the Standing Committee has been examining the local rules governing attorney conduct. In the district courts there is a wide disparity in the approaches taken by the district courts. The Standing Committee is likely to take some action this summer regarding district court rules governing attorney conduct. The Standing Committee may recommend a model local rule, or it may recommend a rather basic national rule. With regard to the rules in the courts of appeals, Dan began by stating that his examination of the local rules in the courts of appeals revealed the following:

4 circuits have no local rule,

2 circuits cover the topic in internal operating procedures,

5 circuits have rules similar to the model local rule being considered for the district courts, (the rules give some specificity to the term "conduct unbecoming a member of the bar") and

1 circuit has its own code.

On the face of it there is a great deal of diversity among the circuits. As a practical matter, Dan reported

that there is not much of a problem. Over the past five years, in the courts of appeals, there were only 46 reported cases involving Rule 46 sanctions.

If the Standing Committee makes a recommendation for a model local rule for use in the district courts, Dan asked the Advisory Committee whether the recommendation should include the courts of appeals. Judge Logan asked whether the model local rule developed for the district courts could be used for the courts of appeals. Professor Coquillette responded that it could. The model local rule is likely to be one that adopts state standards in the absence of conflicting federal law and four of the circuits already have similar rules. The experts that participated in the special conferences sponsored by the Standing Committee concluded that it would be unwise to attempt to develop an entire body of federal rules on attorney conduct.

Dan indicated that the Advisory Committee need not make a decision on the issue at this time. Once the Standing Committee makes a recommendation at its June meeting, Dan suggested that it would be appropriate for the Advisory Committee to take up that specific recommendation at its next meeting. Dan's purpose in discussing the issue with the Advisory Committe at this time was simply to advise the Committee that the issue would be coming before the Standing Committee and the Advisory Committee will need to respond.

Restylization (continued)

Rule 28

No changes were recommended in Rule 28.

There was discussion about whether the Rule 28 list should include the statement regarding oral argument now authorized by Rule 34. (Rule 32(a)(7)(B)(iii) says that any statement with respect to oral argument does not count toward the length limitations for a brief.) Although Rule 34 permits a party to file a statement explaining why oral argument should, or should not, be permitted, no rule explains where the statement should be placed in the brief. One member opposed any mention of a statement concerning oral argument in Rule 28 because it would encourage such statements and he believes that they generally are not helpful. Discussion revealed that there are differences in the circuits concerning the use of such a statement and its placement. It was decided not to include in Rule 28 any reference to a statement regarding oral argument.

There was also discussion about the fact that the Rule 28 list does not include the certificate of service. In fact, it is not uncommon for a certificate of service to be filed separately from a brief. The Rule 28 list includes only items that must be included in a brief and, therefore, it would not be appropriate to include the certificate of service in that list.

Rule 29

Although several changes are recommended, most of them are the result of comments submitted following the September 1995 publication of Rule 29. The amendments suggested in the September 1995 publication, and the Advisory Committee's post-publication recommendations, were tentatively approved by the Standing Committee in July 1996.

After publication of the style packet only one substantive change was recommended. That change requires an amicus brief to state the source of its authority to file, i.e., whether it is by leave of court or with consent of all other parties. In addition, minor style changes and a clarifying punctuation change were recommended.

Rule 30

Rule 30(a)(3) was amended to conform to Rule 31(b) so that an unrepresented party proceeding in forma pauperis need only file four copies of the appendix. Minor stylistic changes also were recommended. In 30(a)(3), there was an explicit decision to retain the reference to "memoranda" rather than changing it to singular.

Rule 31

Only minor stylistic changes were recommended.

It was noted that Rule 31(b) only requires a party to serve copies of the brief on "counsel for each separately represented party." There is no requirement of service on unrepresented parties. The Committee decided to place this item on its agenda.

Rule 32

In addition to stylistic changes, several substantive changes were recommended in order to simplify the rule. First, the length limitations based on character counts were deleted because some word processing programs treat spaces and punctuation as characters, while other programs do not. Second, the requirement that the average number of words per page not exceed 280 words was deleted. Third, in 32(a)(5), the provision permitting footnotes to be in 12 point type was deleted. Fourth, in 32(a)(6) the restrictions on the use of boldface type and of all capitals were deleted.

There was discussion about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief. Fourteen thousand is closer to the length of a professionally printed brief 50-page brief. One member pointed out that this rule had been quite controversial principally because lawyers suspected that we were trying to shorten the length of briefs. Over time the proposed rule has become less controversial. In order to avoid reopening the controversy, several members spoke in favor of retaining the 14,000 word limit. A majority favored staying with 14,000; therefore, the word

limitation was not changed.

The commentator's suggestion that 32(d) be amended to emphasize that local variations concerning form are "one direction only" was discussed at length. Specifically the proposal was to state that a court may "waive" requirements but may not add to them. The suggestion was ultimately dismissed because the rule already makes it sufficiently clear that additional requirements may not cause a brief to be rejected.

There was discussion about the mixture of singular and plural nouns in the title of Rule 32. The Advisory Committee voted to make them all plural, but noted that the title of the rules do not consistently use either singulars or plurals. The Committee asked Bryan Garner to assume review of the titles.

The Advisory Committee noted that the Committee Note will need to be amended to conform to the changes made in the text of the rule. The Reporter was also asked to try to incorporate some of the examples found in the seventh circuit's explanation of its rule.

Rule 33

No changes were recommended in Rule 33.

Rule 34

The Reporter's memorandum suggested that any statement about oral argument must be included in the party's brief. One member objected to the suggestion stating that the parties are in a better position to assess the need for oral argument after the briefs are filed. Another member suggested that Rule 34 should authorize local rules that require a party's principal brief to state whether the party requests oral argument. There was discussion about whether such a rule would violate Rule 32(d). Rule 32(d) restricts adoption of local rules concerning "form" and presumably would not preclude such a requirement.

The Committee decided not to direct when or how the statement should be filed. The Committee did recommend, however, a number of amendments to Rule 34(a). First, it was decided to authorize local rules that require parties to file a statement concerning oral argument. Second, the language was altered to make it clear that the statement may indicate that the parties do not want oral argument. Third, the first sentence of 34(a) was made a separate paragraph (1).

Because some members believed that a uniform federal rule governing the time and placement of statements concerning oral argument would be preferable to authorizing local rules, it was suggested that the consideration of a uniform federal rule should be added to the Committee's table of agenda items.

Judge Parker noted that subdivisions (a), (b), (d), (e), and (f) refer to a "party" but subdivisions (c) and (g) refer to "counsel". If an unrepresented party is not allowed to argue or bring physical exhibits to the argument, the distinctions are correct. But if unrepresented parties are allowed to so act, the distinctions may be problematic. Changing both (c) and (g) to passive voice would eliminate identification of the actor. But because an unrepresented party who presents the oral argument is acting as counsel, and because the language distinctions have not caused any difficulties, the Advisory Committee agreed not to

make changes in either (c) or (g).

Another problem that sometimes arises under Rule 34(g) is whether, during oral argument, an attorney may use a chart or diagram that has not been admitted into evidence. Disputes have arisen about whether the use of such a chart is an attempt to introduce new evidence at oral argument. A suggestion was made that Rule 34 should state that an exhibit that is not already a part of the record may be used only with consent of the other party, or with the court's permission. Most members of the committee understand the current rule to allow use of charts, etc, that have not been admitted into evidence. The fact that the rule permits the circuit clerk to destroy the exhibits if counsel does not reclaim them within a reasonable time indicates that the rule refers, at least in part, to items not admitted into evidence in the trial court. The circuit clerk may not, of course, destroy evidence. The Committee decided to add the issue to its table of agenda items.

Rule 35

Most of the recommended changes in this rule are the result of comments submitted following the September 1995 publication of this rule. The amendments suggested in the September 1995 publication, and the Advisory Committee's post-publication recommendations, were tentatively approved by the Standing Committee in July 1996.

The only additional changes recommended were in subdivision (f) and some other minor style changes.

Within the last year new legislation was passed concerning participation of a senior judge in an en banc hearing. Congress, in Pub. L. 104-175, amended 28 U.S.C. § 46(c). As amended § 46(c) provides:

A court in banc shall consist of all circuit judges in regular active service or such number of judges as may be prescribed in accordance with section 6 . . ., except that any senior circuit judge of the circuit shall be eligible

(1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or

(2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

The statutory language governs which judges can participate in an en banc hearing or rehearing. It was noted that proposed subdivision (f), as published, does not govern who can sit with the en banc court or even who can vote on a petition. Subdivision (f) covers only who should receive a copy of the petition and who can call for a vote on the petition.

The first sentence of subdivision (f) governs who should receive a copy of the petition. During discussion, it was suggested that the sentence should be amended to state that a copy of the petition should be provided to "all panel members, if a panel has been assigned to hear the case," as well as to all judges of the court who are in regular active service. That formulation was ultimately rejected because it may not result in circulation of the papers to every judge who is entitled to sit as a member of the en banc

court. The broadest construction of new § 46(c)(2) may mean that if Judge Jones was an active judge when the case was heard by a panel but took senior status prior to the en banc rehearing, Jones may sit as a member of the en banc court even though Jones was not a member of the panel. As an active member of the court at the time of the panel decision, the judge can be said to have participated in the case even though not a member of the panel because every panel decision is a decision of the court. Jones's participating in the en banc court would be a continuation of the earlier participation. Further construction difficulties arise when there is a second en banc hearing in the same case. Given the lack of certainty about who is eligible to vote on a petition to grant an en banc hearing or rehearing, the consensus was that the rule governing distribution of the petition should err, if at all, on the side of inclusiveness. That is, the rule should ensure that everyone who might be eligible to vote on a petition receives a copy of it.

It was ultimately decided to delete the first sentence of subdivision (f) for two reasons. First, construction of the new statutory language is still uncertain. Second, litigants do not need to know to whom the court circulates a petition. Which judges should receive a copy of a petition is really a matter of internal concern to the court and need not be in a rule.

The language of subdivision (f) which was approved by the Advisory Committee a year ago (following the September 1995 publication of this rule), and tentatively approved by the Standing Committee last July, was purposely vague about which judges can call for a vote. It says that a vote need not be taken "unless a judge requests a vote". In some circuits it is the practice that a senior judge can request a vote even though the senior judge is not a member of the panel and may not be entitled to vote on the question of whether the case will be heard or reheard en banc. The statute does not address the question of who can call for a vote and, although existing Rule 46(b) does not permit a senior judge who was not a member of the panel to call for a vote, the practice in some circuits has not followed the rule. The Committee confirmed its decision to simply state that "a judge" may request a vote.

Rule 36

The Advisory Committee recommended amendment of the title of Rule 36 so that it becomes: "Entry of Judgment; Notice".

Rules 37 and 38

No changes were recommended in either Rules 37 or 38. A commentator stated that Rule 38 violates the First Amendment because the right to petition the government for redress of grievances is not limited to non-frivolous petitions. Members of the committee noted, however, that the Supreme Court has decided that there is no constitutional right to file a frivolous law suit.

Rule 39

The Advisory committee recommended minor word changes in Rule 39. One commentator suggested amending the rule to clarify whether the court of appeals or the district court determines attorney's fees

that are awarded as costs on appeal. Because such a change would be substantive, the Advisory Committee placed that suggestion on its agenda for future consideration.

Rule 40

The only change recommended was to amend the rule so that it consistently refers to "panel rehearing" rather than simply to "rehearing." Some time was spent comparing Rules 35 and 40 and any possible unintended effects flowing from the amendments of those two rules. One member asserted that until now Rule 40 governed both petitions for panel rehearing and for rehearing en banc. Another disagreed. Previously, Rule 35 governed "suggestions" for rehearing en banc and Rule 40 governed only "petitions" for rehearing. Given the fact that under the amended rules both panel rehearings and rehearings en banc will be requested in "petitions" the Advisory Committee concluded that it would be best to amend Rule 40 so that it clearly governs only "panel rehearings".

The difference between 35(e) and 40(a)(3) was discussed. Rule 35(e) says that a response to a petition may not be filed unless the court orders a response. Rule 40(a)(3) also says that an answer may not be filed absent court permission, but that a panel rehearing ordinarily will not be granted in the absence of the court's request for an answer. The consensus was that the distinctions are appropriate. When an en banc rehearing is granted, it is not as important that the winning party have an opportunity to speak before the court grants the rehearing. In those instances the winner will be heard during the rehearing. If a panel rehearing is granted, however, the court usually enters a new dispositive judgment and the winning party should have an opportunity to be heard before the new judgment is entered.

The possible merger of Rules 35 and 40 was discussed and added to the Committee's table of agenda items. At least one difficulty with the merger was noted: Rule 35 governs initial en banc hearings as well as rehearings en banc. That is the apparent reason for the placement of Rule 35 prior to the rule governing Entry of Judgment (Rule 36) and before Rule 40.

Rule 41

All but one of the recommended changes were the result of comments submitted following the September 1995 publication of this rule. The amendments suggested in the September 1995 publication and the Advisory Committee's post-publication recommendations were tentatively approved by the Standing Committee at its July 1996 meeting.

The one new change recommended by the Advisory Committee is in Rule 41(d)(2)(B). The change requires a party who files a petition for a writ of certiorari to notify the circuit clerk <u>in writing</u> that the petition has been filed.

Rule 42

No changes were recommended.

Rule 43

The only change recommended was to change "Office-Holder" to "Officeholder" in the caption of 43(c)(2).

Rule 44

No changes were recommended.

Rule 45

The only change recommended was to substitute "under the court's direction" for "under the direction of the court" in 45(b)(2).

Rule 46

A number of language changes were recommended in Rule 46(a)(2). First, the language stating that the form would be "furnished by the clerk" was deleted as unnecessary. Second, the language requiring the applicant for admission to subscribe "at the foot of the application" was deleted as unnecessary. Third, the language requiring an applicant to "take" the oath was deleted as redundant in light of the fact that the applicant is required to subscribe to the oath and no oath is otherwise taken. There had been a motion to delete the second half of the first sentence (i.e. to delete "and furnished by the clerk, that contains the applicant's person statement showing eligibility for membership") but the motion was defeated.

The opening sentence of 46(a)(3) was rewritten to make it consistent with the style conventions.

Rule 46(b) was rewritten to have three paragraphs. Paragraph (1) was rewritten to have two subparagraphs.

In Rule 46(c) the caption and the first sentence were rewritten to make it consistent with the style conventions.

Rule 47

The Committee recommended changing 47(a) to refer to general directives to "parties or lawyers" rather than to "a party or a lawyer." If a directive is addressed to a specific party or specific lawyer, it may well be in the form of an order. It is only when the requirements are intended to affect the class of "parties" or

"lawyers" that Rule 47 appropriately insists that the requirements be embodied in formal local rules.

Rule 47(b) was amended to allow the courts of appeals to regulate practice in a particular case "in any manner consistent with federal law, these rules, and local rules of the circuit." Although "federal law" could be construed to include the federal rules and local rules, the specification is in the current rule, has been helpful to practitioners, and probably should be continued lest its deletion be taken as a substantive change.

It was noted that the language changes discussed above did not disturb the consistency of Rule 47 with the parallel Civil Rule.

One commentator noted that the objective of 47(b) is to preclude sanctions unless an alleged violator received actual notice of the requirement before the alleged violation. The commentator suggested substituting the word "had" for "has". The Advisory Committee rejected the suggestion because making the change would make the Appellate Rule different from the Civil Rule which uses the phrase "has received."

Rule 48

The only change recommended in Rule 48 is to delete the phrase "make recommendations about" and to substitute "recommend" in the first sentence or 48(a).

Form 4

In August 1996 the Advisory Committee, with the approval of the Standing Committee, published proposed amendments to Form 4.

Mr. Fisher began the discussion by noting that the clerks oppose the length of the form but have not proposed an alternative.

There was discussion about whether it is fair to treat the assets of an applicant's spouse as available to the applicant. The Advisory Committee rejected the suggestion that if an applicant is not living with his/her spouse, the applicant could write "NA" in response to any question about the applicant's spouse. Although in some states a married person may not be responsible for legal costs incurred by the other, in other states a married person may be so responsible. The Committee decided to continue to request information about the spouse's assets. The form does not undertake to resolve the question of whether one spouse is responsible for the legal costs of the other. The form only requests information; the court determines what it does with the information. If the applicant is legally separated from his/her spouse or

is unable to get the information from his/her spouse, the applicant can bring those facts to the attention of the court.

The Committee agreed to amend the form so that it requests employment history only for the preceding two years.

The statutory requirement that a prisoner attach a statement of the balances in the prisoner's institutional accounts applies only when the prisoner is seeking to appeal a judgment in a civil action or proceeding. The instruction was amended accordingly.

The form as amended was approved for submission to the Standing Committee.

Proposed Substantive Amendments

Several of the commentators on the restyled rules offered substantive suggestions for improving the rules. With the exception of certain substantive changes made necessary by recent statutory amendments, the Advisory Committee decided not to make any additional substantive changes that could delay, or possibly even derail, the style project.

In addition to the topics enumerated during the Advisory Committee's discussion, the suggestions listed below were raised by various commentators. Each suggestion is followed by the Advisory Committee's recommendation as to whether the suggestion should receive further study by the Committee.

1. Rule 4 should clarify whether a cross-appeal is necessary to preserve an issue no addressed by the appellant.

A complex jurisprudence treating this question has developed. The Advisory Committee concluded that the issue is substantive and not susceptible solution by rule and therefore did not recommend placing the issue on the agenda.

2. The time computation problem addressed in Rule 4(a)(4)(vi) should be addressed by amending Fed. R. App. P 26(a) so that it is consistent with Fed. R. Civ. P. 6(a).

The Advisory Committee decided to place this suggestion on its table of agenda items.

3. Rule 4(a)(5) should not grant an extension of time for filing a notice of appeal upon a motion filed *ex parte.*

The Advisory Committee decided not to place this suggestion on its agenda.

4. Rule 4(a)(5) should be amended to clarify that the standard for granting an extension during the first 30 days is different (i.e. more lenient) than during the second 30 days. (This suggestion was put forth by a committee member rather than one of the commentators.)

The Advisory Committee decided to place this suggestion on its table of agenda items.

5. Rule 6 should require the appellant to serve the statement of issues on other parties, not just on the appellee.

The Advisory Committee decided to place this suggestion on its table of agenda items.

6. Rule 6 should state which exhibits are too bulky or heavy for routine transmission to the court of appeals, and at what time arrangements must be made for sending such exhibits to the courts of appeals.

The Advisory Committee decided not to place this suggestion on its agenda.

7. Rule 8 should require a party appealing from a Bankruptcy Appeal Panel (B.A.P.) to first seek a stay from the B.A.P.

The Advisory Committee decided not to place this suggestion on its agenda. There are many places in the rules where references could be made to the B.A.P. but they have not been added.

8. A reference to the B.A.P. should be added to Rule 8(a)(2).

The Advisory Committee decided not to place this suggestion on its agenda.

9. Many appeals from agencies arise out of informal rulemaking proceedings. In such instances, it is not clear who is a party to the agency proceeding for purposes of the 15(c)(1) requirement to serve the petition on all parties "admitted to participate in the agency proceedings." One commentator suggests amending Rule 15 to incorporate the solution adopted by D.C. Cir. R. 15(a) which provides that "in cases involving informal rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute."

The Advisory Committee decided to place this suggestion on its table of agenda items.

10. Rule 24(a)(2) says that if the district court grants a motion to proceed IFP, "the party may proceed on appeal without prepaying or giving security for fees and costs." This may need to be amended in light of the Prisoner Litigation Reform Act. Prisoners must pay the filing fee, but need not prepay the full amount

if they do not have it; partial payments will be collected by the court over time.

The Advisory Committee decided to place this suggestion on its table of agenda items.

11. Rule 25 should be amended to extend the "mailbox rule" to petitions for rehearing.

The Advisory Committee decided not to place this suggestion on its agenda.

12. Amend Rule 27(b) to permit appellate commissioners to rule on procedural motions.

The Advisory Committee decided to place this suggestion on its table of agenda items.

13. Amend Rule 28(j) so that the letter referencing new authorities can include a brief explanation of the new authority and a statement of its significance.

The Advisory Committee decided to place this suggestion on its table of agenda items. Although such explanations and statement are currently prohibited, they are submitted. It would be preferable to regulate the practice rather than to ignore it.

14. Amend Rule 29 to permit a state agency or state officer to file an amicus brief without consent of the parties or leave of court.

The Advisory Committee decided to place this suggestion on its table of agenda items.

15. Amend Rule 31 so that a court of appeals is permitted to "modify" rather than simply "shorten the time for briefs to be filed." The change would permit a court to shift the briefing schedule.

The Advisory Committee decided not to place this suggestion on its agenda.

16. Amend Rule 31 so that it is not necessary to serve 2 copies of a brief on counsel for each party to the appeal.

The Advisory Committee decided not to place this suggestion on its agenda.

(The agenda already includes a suggestion regarding electronic filing of briefs. A committee member suggested, and the Advisory Committee agreed, that the item should be expanded to include consideration of requiring service of a disk on the other parties.)

17. Amend Rule 32 to establish the cover color for a petition for rehearing, for a petition for rehearing en banc, for a response to either, and for a supplemental brief.

The Advisory Committee decided to place this suggestion on its table of agenda items.

18. Delete the third exception in Rule 34 (a court may dispense with oral argument if "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument").

The Advisory Committee decided not to place this suggestion on its agenda.

19. Amend Rule 36 to address the disposition of appeals without any explanatory opinion.

The Advisory Committee decided to place this suggestion on its table of agenda items.

20. Rule 36 should address the practice of issuing opinions that are not for publication.

This topic is already on the table of agenda items.

21. Amend Rule 39 to state whether the court of appeals or the district court determines the attorney's fees awarded as costs on appeal and the procedure (including time for filing) for determining those fees.

The Advisory Committee decided to place this suggestion on its table of agenda items.

22. Amend Rule 44 to make constitutional challenges to federal regulations.

The Advisory Committee decided to place this suggestion on its table of agenda items.

23. Amend Rule 46 so that once a person becomes a member of the bar of a court of appeals for any circuit, that person may appear as counsel in any other circuit without the need for admission to the bar of that court.

The Advisory Committee decided not to place this suggestion on its agenda.

In addition to those topics added to the table of agenda items as a result of the commentators' suggestions, the Advisory Committee decided to add consideration of the Effective Death Penalty Act. The Committee should determine whether additions or amendments are necessary to implement the new act.

Conclusion

Judge Logan announced that this meeting was the last that he would chair. He thanked all of the committee members for their hard work, their openness, and their cooperative spirit. He thanked in particular: Judge Stotler for her attendance at the meetings and her close attention to the work of this, as well as all of the other advisory committees; Judge Easterbrook for his expertise and assistance; and John Rabiej and his office for all of the support they provide.

The next meeting will be scheduled for the fall, tentatively September 29 and 30 in Bar Harbor (Maine), Santa Fe (New Mexico), or Williamsburg (Virginia).

The meeting adjourned at approximately 2:30 p.m. on April 4.

Respectfully submitted,

Carol Ann Mooney

Reporter